Filed 7/30/12 P. v. Hernandez CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JORGE PACHECO HERNANDEZ, Defendant and Appellant.	G044335 (Super. Ct. No. 08WF1791) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Lance Jensen, Judge. Affirmed.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Peter Quon, Jr., and Randall D. Einhorn, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Jorge Pacheco Hernandez of sexual penetration of a child under age 10 (Pen. Code, § 288.7, subd. (b)) and committing a lewd act on a child under age 14 (§ 288, subd. (a)) with substantial sexual contact (§ 1203.066, subd. (a)(8)). Hernandez contends the trial court prejudicially erred by admitting the testifying child victim's out of court statements to a police officer (Evid. Code, §§ 1235, 1237; all statutory references are to the Evidence Code, unless otherwise noted) and a social worker (§ 1360). For the reasons expressed below, we affirm.

I

FACTS AND PROCEDURAL BACKGROUND

In August 2008, seven-year-old M. and her parents shared a bedroom in a four bedroom house in Garden Grove. Hernandez rented one of the other bedrooms.

On August 21, M. told her mother, Maria, that Hernandez had touched her inappropriately after her parents left for work on August 18. Maria arranged for her 15-year-old son, G., to watch M. the next morning. After Maria left for work, G. saw Hernandez enter the bedroom M. shared with her parents and where she was sleeping. G. informed Maria, who returned home from work and confronted Hernandez. After initially denying any abuse, he ultimately admitted he had "touched" or "grabbed" M.'s "parts" on a prior occasion. Maria reported the incident to the police.

M. testified Hernandez came into the room and "got on [her]." He touched her on the back, bottom, legs and her "part," meaning her vagina. She did not remember if he put his finger in her part. She did not remember telling a police officer in a pretrial interview that Hernandez inserted his finger into her vagina, but she testified that she truthfully described Hernandez's actions to the officer. At some point after the incident, Hernandez offered M. $10 not to tell anyone he had touched her inappropriately. She

told him she did not want the money. At points during her direct examination, M. testified she did not remember anything about the incident "because it's been a long time." On cross-examination, M. explained she did not remember what happened because she was "asleep the whole time," and only learned of the incident because Hernandez told her what happened.

Officer Luis Ramirez interviewed M. shortly after he arrived at the residence on August 22. Although M. appeared very nervous and at times was reluctant to discuss the incident, she described how she was molested. M. told Ramirez , she awoke when her parents left for work to kiss them goodbye, then went back to sleep. About 30 minutes later, she heard the bedroom door open and felt somebody sit on the bed. The person touched her back, arms, legs, and buttocks, and she felt a finger penetrate her vagina. She ignored the touching and attempted to continue sleeping. She did not immediately report the incident to her parents because she forgot about it. Although she could not identify the person who touched her, she knew it was Hernandez because a few days after the molestation, he admitted he touched her.

A child abuse services team (CAST) social worker also interviewed M. about the incident. M. recounted how Hernandez entered her room, sat on her bed, and grabbed her "part" that she used "to make peepee."[1] He also grabbed her buttocks. She was asleep, did not feel him grab her part, and only knew about it because Hernandez later described the incident to her. M. asked him why he came in the bedroom. Hernandez replied, "'[j]ust because,'" and offered her $10 to remain quiet when M. threatened to tell her mother. She replied she did not want any money. Hernandez responded he would "'go in again.'"

[1] The prosecutor played a digital video disk (DVD) of the CAST interview for the jury.

Later in the interview, M. related she had been sleeping in a skirt with shorts when Hernandez entered the bedroom. She felt him remove the skirt. "He took off my skirt. And, and then I felt that he took off the, um, my panties and I felt everything that he did to me." He touched her between her legs and on the outside of her "butt." She described how he turned her around or over, and touched her "like this. And . . . just with this finger, he put it inside me." Asked about being asleep and feeling his hand and finger, M. said "I did feel it." She did not see who was touching her because she was lying face down, but learned later from Hernandez he was the person who touched her.

Still later in the interview M. stated she was asleep and "did not know" what happened. But subsequently she said she did remember "when he . . . did all that." She forgot to tell her mom about the abuse on the day it happened "because it was already night." After a short break in the interview, M. stated that she forgot to mention Hernandez climbed on top of her and touched his chest before he removed her skirt and panties. He also showed, or said he was going to show, her a magazine with nude women that he kept either in his car or under his bed.

Ramirez encountered Hernandez as he was packing to leave the residence. Hernandez admitted he "touched the little girl" and had made a "stupid mistake." He explained he had been perusing a pornographic magazine, became sexually aroused, and touched M.'s back, arms, buttocks area, and the top portion of her vagina over her clothing. The incident lasted about a minute. He denied digitally penetrating M. Ramirez found an adult pornographic magazine in Hernandez's bedroom dresser.

A forensic nurse who examined M. a few weeks after the incident, testified M.'s genital area appeared normal. A CAST pediatrician explained penetration would

not necessarily result in injury, and the vaginal area can heal quickly without leaving evidence of abuse.

Following a trial in June 2010, a jury convicted Hernandez as indicated above. In October 2010, the trial court sentenced Hernandez to 15 years to life in prison for the sexual penetration conviction (Pen. Code, § 288.7, subd. (b)), and imposed a concurrent term for the lewd act conviction.

II

DISCUSSION

A. *The Trial Court Did Not Abuse Its Discretion by Admitting M.'s Statements to the CAST Social Worker*

The prosecutor moved to admit M.'s statements to the CAST social worker under section 1360.[2] Hernandez's lawyer objected M. was not "competent" to testify about the "charged offenses," because M. repeatedly stated to the social worker she was "asleep the whole time and . . . didn't feel anything," and the "only way she knows it happened at all is that . . . the defendant told her about it." Defense counsel requested that M. testify at a hearing outside the jury's presence to determine whether she was awake during the incident because her inconsistent statements were "all over the map" and she was not "a percipient witness to this." The prosecutor opposed Hernandez's

---

[2] Section 1360 states, in pertinent part: "(a) In a criminal prosecution where the victim is a minor, a statement made by the victim when under the age of 12 describing any act of child abuse or neglect performed with or on the child by another, or describing any attempted act of child abuse or neglect with or on the child by another, is not made inadmissible by the hearsay rule if all of the following apply: [¶] (1) The statement is not otherwise admissible by statute or court rule. [¶] (2) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability. [¶] (3) The child either: [¶] (A) Testifies at the proceedings. [¶] (B) Is unavailable as a witness, in which case the statement may be admitted only if there is evidence of the child abuse or neglect that corroborates the statement made by the child."

request, arguing that M. was competent to testify and her statements in the CAST interview were reliable.

Addressing the issue outside the presence of the jury, the trial court, after watching the DVD and reading the transcript of M.'s CAST interview, found M. competent to testify. The court noted there was ample basis to attack her credibility "as to the basis and the foundation as to that which she's going to testify." The court stated M. had an "evolving story," but there was evidence she had a "semblance of some memory of something or some independent grounds other than her statements to justify the testimony." The court declined Hernandez's request to have M. testify at a hearing outside the presence of the jury.

Before the prosecutor played the DVD for the jury, Hernandez again objected to the CAST interview. He argued M.'s CAST statements were not inconsistent with her testimony (§§ 1235, 770) unless the court found M.'s professed lack of memory during her testimony was a deliberate evasion. The court overruled the objection. After the court played the DVD of the CAST interview, defense counsel complained section 1360 was inapplicable because the trial court did not conduct a hearing outside the jury's presence "about sufficiency of reliability. The court never did that."

Hernandez contends he suffered a due process violation because the prosecution failed to establish the reliability of M.'s CAST statements. (§ 1360, subd. (a)(2).)

The Attorney General asserts Hernandez forfeited the claim (*People v. Stewart* (2004) 33 Cal.4th 425, 492; § 353, subd. (a)) because he did not contest the reliability of M.'s CAST statements, objecting only that M. was not "competent to

testify" and insufficient evidence existed to establish M. "was a percipient witness" because of her conflicting statements on whether she was awake during the incident.

Hernandez argues he raised the issue "under the umbrella of 'competency,'" because his trial court objection "went precisely to the question of whether the CAST interview was trustworthy or worthy of confidence — the hallmarks of reliability." He asserts the trial court understood his objection raised the issue of reliability, but the court found the "interview had the earmarks of reliability, as did [M.'s] statements . . . despite the inconsistencies regarding the acts and the complainant's ability to perceive them."

The terminology the parties employed appeared at times to conflate the issue of a witness's competency to testify and the foundational requirement a witness testify only from personal knowledge.[3] Although the issue is close, we conclude

---

[3] Section 700 provides that except as otherwise provided by statute, every person, irrespective of age, is qualified (or "competent") to be a witness and no person is disqualified to testify to any matter. (See also Pen. Code, § 1321 [rules of competency same as in civil cases unless otherwise specially provided].) Section 701, subdivision (a), provides a witness may be disqualified where she is incapable of expressing herself concerning the matter so as to be understood, or the witness is incapable of understanding the duty of a witness to tell the truth.

Knowledge is separate issue. The testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. (§ 702, subd. (a); *People v. Collins* (1968) 68 Cal.2d 319, 328.) Personal knowledge means a present recollection of an impression derived from the exercise of the witness' own senses. (Cal. Law Revision Com. com., 29B pt. 2 West's Ann. Evid. Code (1995 ed.) foll. § 702, p. 300.) The ability of a competent witness to perceive and recollect with respect to the particular matter on which the witness testifies is preliminarily determined by the trial judge, and ultimately redetermined by the jury. (*Id.*, foll. § 701, at p. 284; § 403, subd. (a)(2).)

Hernandez does not challenge the trial court's express and implied findings that M. was qualified (competent) as a witness. He also does not claim the court erred by

Hernandez's lawyer effectively objected to the prosecution's motion to admit the CAST interview under section 1360 by asserting M. was "all over the map" in her description of the incident to the CAST worker. The court addressed the issue outside the presence of the jury, and the trial court implicitly relied on section 1360 to admit the CAST interview. Accordingly, we conclude Hernandez raised the issue of reliability of the CAST statement under section 1360.

Turning to the merits of Hernandez's claim, he contends the trial court erred in admitting M.'s CAST interview because her statements were unreliable. "During the detailed interview, [M.] gave conflicting statements. She said appellant digitally penetrated her. . . . Then she said she did not see who touched her because she was lying face down. . . . However, she knew appellant was the assailant because he told her so. . . . Further into the CAST interview, [M.] indicated that appellant sat down on her bed, touched her inappropriately and then removed her skirt, turned her over and engaged in additional acts of inappropriate touching. . . . Later she said she actually was asleep when it happened. . . . Further on, she did not remember any digital penetration or the acts she described having occurred. She knew they occurred because appellant told her so. . . . When asked for additional information, she said she felt a finger inside her."

We review the trial court's admission of evidence under section 1360 for abuse of discretion. (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1367.)[4] Under

---

failing to conduct a section 402 hearing concerning M.'s ability to perceive and recollect (personal knowledge), or by submitting the issue of M.'s knowledge to the jury.

[4] Hernandez cites *People v. Eccleston* (2001) 89 Cal.App.4th 436 (*Eccleston*), where the court applied an independent standard of review. *Eccleston* is distinguishable because the victim in that case did not testify, and the issue was whether admission of statements under section 1360 violated the Sixth Amendment Confrontation Clause of the United States Constitution. Under the federal Constitution, a trial court's findings concerning reliability for Confrontation Clause purposes are subject to

that standard, reversal is not required unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner resulting in a miscarriage of justice. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1004.)

The nonexhaustive list of factors cited as relevant to the reliability of hearsay statements made by child witnesses in sexual abuse cases are (1) spontaneity and consistent repetition; (2) the mental state of declarant; (3) use of terminology unexpected of a child of a similar age; and (4) lack of motive to fabricate. (*In re Cindy L.* (1997) 17 Cal.4th 15, 30; *Eccleston*, *supra*, 89 Cal.App.4th at p. 445; *People v. Brodit* (1998) 61 Cal.App.4th 1312, 1330.) The child's ability to understand the duty to tell the truth and to distinguish between truth and falsity is also a factor in determining the reliability of his or her extrajudicial statements. (*Cindy L.*, at p. 30 [a child incompetent to testify at trial because he or she did not understand the duty to tell the truth, does not necessarily render the child's hearsay statements unreliable, but was merely a factor for the trial court to consider].) These factors relate to whether the child declarant was likely to be telling the truth when the statement was made.

The trial court did not abuse its discretion in finding the time, content, and circumstances of M.'s CAST statements provided sufficient indicia of reliability for admissibility under section 1360. The record supports a finding that at the time of the incident and the CAST statement a few weeks later, M., a seven-year-old second grader, was capable of expressing herself and understood the difference between the truth and a lie. It also reflected she was capable of sensing and recalling any abuse, as evidence by her spontaneous disclosure of the abuse to her mother a few days after the incident. She

---

independent review on appeal. (*Lilly v. Virginia* (1999) 527 U.S. 116, 136.) Here, because M. testified at trial and submitted herself to cross-examination, defendant's contention is one of statutory compliance only. The abuse of discretion standard of review therefore applies.

repeated the claim of abuse to Officer Ramirez the following day. She then provided a lengthier and more detailed version of the incident a few weeks later to the CAST interviewer. Without leading questions and in the nonthreatening environs of the social services facility, M. explained how Hernandez came into her room and abused her, as recounted in detail above. M. had no apparent motive to fabricate. Significantly, defendant corroborated the abuse, disputing only whether he inserted his finger into her genitals. Although M.'s statements and testimony presented issues concerning whether M. was asleep and remembered the abuse, particularly whether Hernandez digitally penetrated her, or whether M. only learned about the abuse from Hernandez, we cannot say the trial court acted arbitrarily or capriciously in admitting the CAST statements and allowing the jury to resolve any factual disputes.

B. *The Trial Court Did Not Abuse Its Discretion by Admitting M.'s Statements to Officer Ramirez*

Hernandez also contends the trial court abused its discretion by admitting M.'s statements to Officer Ramirez. We review the evidentiary ruling for abuse of discretion. (*People v. Avitia* (2005) 127 Cal.App4th 185, 193.)

Defendant objected in the trial court the statements were not inconsistent with M.'s testimony, and section 1360 did not apply unless the court conducted a hearing on reliability. He also asserted the statements were unreliable. The prosecutor responded the statements were admissible under the hearsay exception for prior inconsistent statements (§ 1235) because they contradicted her testimony and her CAST statements "that she was asleep and she did not recall" anything "and only knew because defendant told her." The prosecutor also asserted M.'s testimony was "evasive to the point where the court could find her reluctance such that this statement should come in . . . ." The trial court ruled the statements were admissible under section 1202 (impeachment of a

hearsay declarant), section 1235 (inconsistent statement), and with the proper foundation, section 1237 (past recollection recorded). The court later ruled the statements had been admitted for the truth of the matters asserted.

Relying on *People v. Ledesma* (2006) 39 Cal.4th 641, 710 (see also *People v. Gunder* (2007) 151 Cal.App.4th 412, 418), Hernandez argues section 1235 did not support admission of M.'s statement to Ramirez because M. testified she did not remember the event, and the lack of recollection cannot be inconsistent with a prior statement describing the event unless there is evidence the claimed lack of memory amounts to a deliberate evasion.[5]

Section 1235 provides, "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770."[6] This provision allows admission of "inconsistent statements of witnesses because the dangers against which the hearsay rule is designed to protect are largely nonexistent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation. The

---

[5] Section 1235 relates to inconsistencies between the declarant's *testimony at the hearing* and the statement sought to be admitted. We therefore disregard the parties' arguments on whether M.'s statement to Ramirez was inconsistent with her CAST statements.

[6] Section 770 provides: "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: [¶] (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or [¶] (b) The witness has not been excused from giving further testimony in the action." No issue concerning section 770 is raised here.

trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court." (Cal. Law Revision Com., com., 29B pt. 4, West's Ann. Evid. Code (1995 ed.) foll. § 1235, p. 225.)

M. testified Hernandez came into the room and "got on [her]." He touched her on the back, bottom, legs, and her "part," meaning her vagina, but did not remember if he digitally penetrated her. She also did not remember telling the investigating police officer that defendant inserted his finger, but testified she truthfully described the incident to the officer. At some point after the incident Hernandez spoke to her, told her he touched her, and wanted to give her $10 to remain quiet. Hernandez did not tell her what part of her body he touched. At other points during her direct examination, M. stated she did not remember anything about the incident "because it's been a long time." She denied that she did "not want to talk about it," and remembered telling her mother that Hernandez had come into her room and touched her. On cross-examination, M. testified she did not tell her mother what happened because she was "asleep the whole time" and did not know what had happened. She only found out what happened when Hernandez told her.

M.'s pretrial statements to Ramirez differed from her trial testimony. M. told the officer that about 30 minutes after her parents left for work, she heard the bedroom door open, but ignored it and continued to sleep. She felt somebody sit on the bed, but she continued to ignore it. The person touched her back, arms, legs, and buttocks and a finger penetrated her vagina. She did not react and tried to ignore the touching. M. claimed she did not immediately report the incident to her parents because

she forgot about it. She could not identify the person but knew it was Hernandez because he later admitted he touched her.

M.'s statements to Officer Ramirez she was aware of the touching but tried to ignore it were inconsistent with her testimony she was asleep during the incident and unaware of the abuse. The trial court therefore did not abuse its discretion in admitting M.'s statements to Officer Ramirez under section 1235.

M.'s statements to Ramirez also were admissible under section 1237, which provides as follows: "(a) Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying, the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement is contained in a writing which: [¶] (1) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory; [¶] (2) Was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness' statement at the time it was made; [¶] (3) Is offered after the witness testifies that the statement he made was a true statement of such fact; and [¶] (4) Is offered after the writing is authenticated as an accurate record of the statement. [¶] (b) The writing may be read into evidence, but the writing itself may not be received in evidence unless offered by an adverse party."

Hernandez apparently agrees the prosecution established the foundation to admit M.'s statement under section 1237. M.'s testimony suggested she had insufficient present recollection to testify fully and accurately. Her statement to Ramirez would have been admissible if made by her while testifying. M.'s statements were presumably recorded in Ramirez's police report made at a time when the facts were fresh in

M.'s memory, and the statement was offered after M. testified her statement to Ramirez was true. (See *People v. Cowan* (2010) 50 Cal.4th 401, 467 (*Cowan*) [whether an adequate foundation exists for admission of a statement under section 1237 turns on whether the statement was reliable].)

Hernandez argues "the reliability of the statement was questionable" because the statement was "perfunctory[,] there was no indication Ramirez was schooled in the questioning of a child witness[,] and, more importantly, Ramirez'[s] inquiry did not include a question whether [M.] was describing acts that occurred while she was awake or asleep." Factors potentially affecting truthfulness at the time of the prior statement are matters for cross-examination and "the weight of these factors, and their effect on the statement's credibility, [are] for the jury to decide." (*Cowan*, *supra*, 50 Cal.4th at p. 468 [witness was cross-examined extensively about his drug use, mental illness, multiple motives to lie, and other factors potentially affecting his truthfulness at the time he made his prior statement].)[7]

Based on the foregoing, we conclude the trial court did not err in admitting M.'s pretrial statements to Ramirez.

---

[7] Because the trial court admitted M.'s statement to Ramirez for the truth of the matters asserted, we see no point in addressing the court's ruling admitting M.'s statements under section 1202. Section 1202 authorizes admission of inconsistent statements and conduct to attack the credibility of a hearsay declarant. (See *People v. Osorio* (2008) 165 Cal.App.4th 603, 617 [party may use an inconsistent statement to partially impeach a hearsay statement the party previously introduced].) M. was a hearsay declarant because the court admitted her CAST statement. Section 1202 statements are not admissible to prove the truth of the matters asserted.

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.